

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BROOKDALE SENIOR LIVING)
COMMUNITIES, INC., a foreign corporation)
dba CLARE BRIDGE OF LYNNWOOD,)
Plaintiff,)
v.)
LORRAINE J. HARDY, by and through her)
Guardian of the Estate, OHANA)
FIDUCIARY CORPORATION,)
Defendants.)

Case No.

COMPLAINT FOR DECLARATORY
JUDGMENT TO COMPEL
ARBITRATION

COMES NOW Plaintiff Brookdale Senior Living Communities, Inc., by and through its attorneys of record, and files this Complaint for Declaratory Judgment to Compel Arbitration in accordance with the arbitration agreement between the parties. In support thereof, Plaintiff alleges and states:

I. NATURE OF THE ACTION

1.1 Plaintiff seeks an order from this Court pursuant to the Federal Arbitration Act, 9 U.S.C. § 4, compelling Defendants Lorraine Hardy and Ohana Fiduciary Corporation to arbitrate a dispute existing among the parties in accordance with the terms of an Arbitration Agreement properly executed by Defendant Lorraine Hardy's son and attorney-in-fact on January 17, 2008.

COMPLAINT FOR DECLARATORY JUDGMENT TO
COMPEL ARBITRATION - 1

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1 costs, as well as expert fees. Based on the categories of claimed damages by Defendants, the
2 amount in controversy exceeds \$75,000, exclusive of interest and costs.

3 3.2 Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because a substantial
4 part of the events giving rise to the claims occurred within this district and Defendants are
5 subject to personal jurisdiction in this district.

6 3.3 Venue is also proper in this Court pursuant to 9 U.S.C. § 4 because the parties
7 agreed to arbitrate any disputes between them in Lynnwood, Washington, which is located
8 within the Western District of Washington. (*See* Exhibit B at § V.A.3.)

9 IV. FACTUAL BACKGROUND

10 A. The Durable Power of Attorney.

11 4.1 Defendant Lorraine Hardy appointed her son, Warren Weber, her attorney-in-
12 fact when she executed a Durable Power of Attorney (“Power of Attorney”) on or about
13 December 13, 2007. A true and correct copy of the Power of Attorney is filed herewith as
14 “Exhibit A” and is incorporated herein by reference as if fully set forth herein.

15 4.2 The powers granted to Warren Weber by the Power of Attorney are broad. The
16 Power of Attorney granted Warren Weber “all of the powers of an absolute owner over the
17 assets and liabilities” of Lorraine Hardy. (Exhibit A at p.1.) For instance, Mr. Weber was
18 authorized to “[m]ake, do and transact all and every kind of business of every kind and
19 description,” “[p]rovide for the support, maintenance, health emergencies, urgent necessities,
20 and death with dignity,” and “[t]o make and file disclaimers under federal or state law[.]”
21 (Exhibit A at p.1-2.)

22 4.3 In addition, the Power of Attorney granted Mr. Weber comprehensive rights to
23 make healthcare decisions for his mother:

24 Employ and Discharge Health Care Personnel. I authorize my Attorney-in-
25 Fact to employ and discharge medical personnel including physicians,
26 psychiatrists, dentists, nurses, and therapists as my Attorney-in-Fact shall
27 deem necessary for my physical, mental and emotional well-being, and to
cause to be paid to them reasonable compensation.

1 Give, Withhold or Withdraw Consent to Medical Treatment. I authorize my
 2 Attorney-in-Fact (a) to give or withhold consent to any medical procedure,
 3 test or treatment, including surgery; (b) to arrange for my hospitalization,
 4 convalescent care, hospice, or home care[.]

5 (Exhibit A at p.2.)

6 4.4 The Power of Attorney included a “reliance” provision, acknowledging that the
 7 “Attorney-in-Fact and all persons dealing with the Attorney-in-Fact shall be entitled to rely
 8 upon this Power of Attorney[.]” (Exhibit A at p.5.)

9 **B. Lorraine Hardy’s Residency at Clare Bridge.**

10 4.5 On or about January 17, 2008, Lorraine Hardy became a resident of Clare
 11 Bridge, an assisted living community located in Snohomish County, Washington.

12 4.6 On that date, pursuant to the Power of Attorney, Warren Weber signed the
 13 documents relating to his mother’s residency at Clare Bridge including: (1) the Alterra
 14 Residency Agreement; (2) Schedule of Services and Rates; and (3) Responsible Party
 15 Agreement. True and correct copies of the Residency Agreement, Schedule of Services and
 16 Rates and Responsible Party Agreement are filed herewith as “Exhibit B” and are incorporated
 17 herein by reference.

18 4.7 The Residency Agreement specifically states that the agreement “is for the
 19 benefit of and binds the parties and their respective heirs, representatives, successors and
 20 assigns.” (See Exhibit B at p.20.)

21 **C. The Arbitration Agreement.**

22 4.8 Section V.A of the Residency Agreement includes an arbitration provision
 23 (hereinafter, the “Arbitration Agreement”), which provides that the parties shall submit any
 24 disputes to binding arbitration. (See Exhibit B at p.13-18.)¹

25 4.9 On January 17, 2008, Mr. Weber signed the Arbitration Agreement pursuant to
 26 the Power of Attorney. (See Exhibit B at p.17-18.)

27 ¹ Page 16 from Ms. Hardy’s Residency Agreement cannot be located in spite of a diligent and
 reasonable search. Brookdale has located a representative example of Page 16 from another
 Alterra Residency Agreement, which is included within Exhibit B in the place of Page 16.

1 4.10 In signing the Arbitration Agreement on his mother's behalf as her attorney-in-
2 fact, Mr. Weber acknowledged that:

3 Any and all claims . . . shall be submitted to binding arbitration, as provided
4 below, and shall not be filed in a court of law. **The parties to this
Agreement further understand that a jury will not decide their case.**

5 (Exhibit B at p.13 (emphasis in original); *see also* Exhibit B at p.18.)

6 4.11 The Arbitration Agreement applies to any and all claims and disputes between
7 the parties, which the Agreement defines in the broadest possible terms:

8 Any and all claims or controversies arising out of or in any way relating to
9 this Agreement or the Resident's stay at Alterra, excluding any action for
10 eviction, and including disputes regarding interpretation of this Agreement,
11 whether arising out of State or Federal law, whether existing or arising in
12 the future, whether for statutory, compensatory or punitive damages and
whether sounding in breach of contract, tort or breach of statutory duties,
irrespective of the basis for the duty or the legal theories upon which the
claim is asserted . . .

13 (Exhibit B at p. 13.) Moreover, "[a]ll current damages and reasonably foreseeable damages
14 arising out of such claims or controversies shall also be incorporated into the initial demand or
15 amendment thereto." (Exhibit B at p.14.)

16 4.12 The Arbitration Agreement provides that the parties shall agree upon an
17 arbitrator that "must either be a retired Washington circuit or federal court judge or a member
18 of the Washington Bar with at least ten (10) years of experience as an attorney." (Exhibit B at
19 p.14.) Further, the arbitrator must be neutral:

20 The arbitrator shall be independent of all parties, witnesses, and legal
21 counsel. No past or present officer, director, affiliate, subsidiary, or
22 employee of a party, witness, or legal counsel may serve as an arbitrator in
the proceeding.

23 (*Id.*) If the parties cannot agree upon an arbitrator, then the parties shall refer the matter to the
24 American Arbitration Association or any "other similar organization." (*Id.*) In such a
25 scenario, "each party shall have the right to request one (1) substitution within ten (10) days of
26 receiving notice of the identity of the arbitrator." (*Id.*)

1 4.13 The Arbitration Agreement also includes a description of the rules of procedure.
 2 First, the Agreement provides that “[t]he Revised Code of Washington concerning arbitration
 3 shall govern the procedure, except if inconsistent with this Arbitration Provision or expressly
 4 stated otherwise in this Agreement.” (Exhibit B at p.13.) Second, the Agreement provides that
 5 “[d]iscovery in the arbitration proceeding shall be governed by the Washington Rules of Civil
 6 Procedure” subject to modifications set forth in Section V.A.6 of the Residency Agreement.
 7 (Exhibit B at p.15.) However, “nothing in this Agreement is to be construed to contradict any
 8 applicable Washington statutory grievance or mediation procedure.” (Exhibit B at p.14.)

9 4.14 The arbitration proceedings shall take place in the county in which the
 10 Residence is located, unless agreed to otherwise by mutual consent of the parties. (Exhibit B at
 11 p.14.)

12 4.15 The Arbitration Agreement places no restrictions on the causes of action that can
 13 be pursued. (*See* Exhibit B at p.13-18.)

14 4.16 Warren Weber placed his initials on page 17 of the Residency Agreement,
 15 indicating that he “read and understood the provisions of section V., subsection A”—i.e., the
 16 Arbitration Agreement. (*See* Exhibit B at p.17, 21.)

17 4.17 Section V.C of the Residency Agreement provides that the resident
 18 “acknowledges that he or she has been encouraged to discuss this Agreement with an attorney”
 19 and also that the “parties to this Agreement further understand that a jury will not decide their
 20 case.” (*See* Exhibit B at p.18.)

21 4.18 Warren Weber placed his initials on page 18 of the Residency Agreement,
 22 indicating that he “read and understood the provisions of section V., subsection C.” (*See*
 23 Exhibit B at p.18, 21.)

24 4.19 Lorraine Hardy resided at Clare Bridge of Lynnwood until June 25, 2013.

25 4.20 Neither Lorraine Hardy nor Warren Weber rescinded the Arbitration Agreement
 26 during the course of Ms. Hardy’s residency at Clare Bridge.

1 4.21 Likewise, Ohana never rescinded the Arbitration Agreement executed by
2 Warren Weber following its appointment as the Full Guardian of the Estate of Lorraine J.
3 Hardy in June of 2008.

4 **D. The State Court Action Initiated by Lorraine Hardy’s Guardian of the Estate.**

5 4.22 On November 7, 2014, Lorraine Hardy and Ohana Fiduciary Corporation
6 (“Ohana”), as Full Guardian of the Estate, filed an Amended Complaint for Damages against
7 Brookdale in the Superior Court of Washington for Snohomish County in the case captioned as
8 *Lorraine J. Hardy, by and through her Guardian of the Estate, Ohana Fiduciary Corporation*
9 *v. Brookdale Senior Living Communities, Inc. d/b/a Clare Bridge of Lynnwood et al.*, Cause
10 No. 14-2-07067-3 (hereinafter, the “Hardy Lawsuit”). A true and correct copy of the Amended
11 Complaint for Damages is filed herewith as “Exhibit C” and is incorporated herein by
12 reference.

13 4.23 The *Hardy* Lawsuit includes claims for medical negligence and violation of
14 Washington’s Vulnerable Adult Statute and alleges that Brookdale “caused severe and
15 permanent injuries and damages to Ms. Hardy” during her residency at Clare Bridge of
16 Lynnwood. (*See generally* Exhibit C.)

17 4.24 The claims asserted in the *Hardy* Lawsuit—which arise out of Ms. Hardy’s
18 residency at Clare Bridge and sound in tort and breach of statutory duties—fall within the
19 scope of the Arbitration Agreement executed by Mr. Weber pursuant to a valid Power of
20 Attorney.

21 4.25 Ms. Hardy and Ohana initiated this lawsuit notwithstanding the existence of the
22 valid and enforceable Arbitration Agreement, executed by Warren Weber in his capacity as Ms.
23 Hardy’s attorney-in-fact, which obligated Ms. Hardy to resolve any disputes she had with Clare
24 Bridge by using the arbitration process described in the Arbitration Agreement.

25 4.26 In the *Hardy* Lawsuit, Ms. Hardy and Ohana have alleged that the Arbitration
26 Agreement is unenforceable. (*See* Exhibit C at p.12.)

1 4.27 On January 6, 2015, Brookdale provided Defendants’ counsel with written
2 notice of its intent and demand to arbitrate the claims asserted in the *Hardy* Lawsuit pursuant to
3 Section V.A.2 of the Residency Agreement.

4 4.28 Despite Ms. Hardy’s obligation to arbitrate the dispute, Defendants have thus far
5 refused to arbitrate as required under the Residency Agreement.

6 V. CAUSE OF ACTION—DECLARATORY RELIEF

7 5.1 Brookdale restates and realleges the allegations of paragraphs 1.1 through 4.28
8 above, as if fully restated herein.

9 5.2 The Federal Arbitration Act (“FAA”) mandates arbitration of claims that are
10 subject to a written arbitration agreement evidencing interstate commerce. Specifically, the
11 FAA requires arbitration where: (a) there is a valid, written agreement, and (b) there is a
12 dispute within the scope of the agreement.

13 5.3 Section 2 of the FAA provides that:

14 A written provision in any . . . contract evidencing a transaction involving commerce to
15 settle by arbitration a controversy thereafter arising out of such contract or transaction,
16 or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable,
and enforceable, save upon such grounds as exist at law or in equity for the revocation
of any contract.

17 *See* 9 U.S.C. § 2.

18 5.4 The FAA’s “involving commerce” requirement is met because Clare Bridge of
19 Lynnwood is owned and operated by an out-of-state corporation, which provides assisted living
20 services to Washington residents. Brookdale is a Delaware corporation with its principal place
21 of business in Tennessee.

22 5.5 Further, the “involving commerce” requirement is satisfied because Clare
23 Bridge: (a) receives Medicaid funding, and (b) obtains resources and supplies from out-of-state
24 vendors.²

25 ² *See, e.g., Pickering v. Urbantus, LLC*, 827 F. Supp. 2d 1010, 1013-1017 (S.D. Iowa 2011) (finding interstate
26 commerce because the Iowa-based assisted living facility was owned and operated by an entity located in
Washington); *Ruszala v. Brookdale Living Communities, Inc.*, 1 A.3d 806, 817-18, 415 N.J. Super. 272 (2010)
27 (applying the FAA because the assisted living facility received resources and supplies from out-of-state vendors);
Owens v. Coosa Valley Health, 890 So.2d 983, 987 (Ala. 2004) (finding interstate commerce because the nursing
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1 5.6 The FAA’s “written agreement” requirement is met because the parties’
 2 Arbitration Agreement, which was included in the Residency Agreement, was executed by
 3 Defendant Lorraine Hardy’s attorney-in-fact pursuant to a valid Power of Attorney on January
 4 17, 2008.

5 5.7 Thus, the Residency Agreement and accompanying Arbitration Agreement are
 6 contracts “evidencing a transaction involving interstate commerce” within the meaning of 9
 7 U.S.C. § 2.

8 5.8 The FAA’s final requirement—i.e., that there is a dispute within the scope of the
 9 agreement—is also satisfied and requires enforcement of the parties’ Arbitration Agreement.

10 5.9 The Arbitration Agreement provides that:

11 Any and all claims or controversies arising out of or in any way relating to .
 12 . . the Resident’s stay at [Clare Bridge of Lynnwood], excluding any action
 13 for eviction, and including disputes regarding interpretation of this
 14 Agreement, whether arising out of State or Federal law, whether existing or
 15 arising in the future, whether for statutory, compensatory or punitive
 damages and whether sounding in breach of contract, tort or breach of
 statutory duties, irrespective of the basis for the duty or the legal theories
 upon which the claim is asserted, shall be submitted to binding arbitration

16 5.10 The claims asserted in the *Hardy* Lawsuit—which arise out of Ms. Hardy’s
 17 residency at Clare Bridge of Lynnwood and sound in tort and breach of statutory duties—fall
 18 within the scope of the Arbitration Agreement executed by Mr. Weber pursuant to a valid
 19 Power of Attorney.

20 5.11 Defendants improperly filed the *Hardy* Lawsuit in the Superior Court of
 21 Washington for Snohomish County, rather than submitting these claims to binding arbitration
 22 as required by the Arbitration Agreement and the FAA.

23 5.12 Section 4 of the FAA provides that:

24 A party aggrieved by the alleged failure, neglect, or refusal of another to

25 home was regulated by federal regulations and received Medicaid and Medicare funding); *Briarcliff Nursing*
 26 *Home, Inc. v. Turcotte*, 894 So.2d 661, 667-68 (Ala. 2004) (focusing on the fact that the nursing provider was an
 27 out-of-state entity providing services to residents from various states); *McGuffey Health & Rehab. Center v.*
Gibson, 864 So.2d 1061, 1063 (Ala. 2003) (finding interstate commerce because the facility received Medicaid
 and Medicare funding).

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1 arbitrate under a written agreement for arbitration may petition any United
 2 States district court which, save for such agreement, would have jurisdiction
 3 under title 28, in a civil action or in admiralty of the subject matter of a suit
 4 arising out of the controversy between the parties, for an order directing that
 5 such arbitration proceed in the manner provided for in such agreement....
 The court shall hear the parties, and upon being satisfied that the making of
 the agreement for arbitration or the failure to comply therewith is not in
 issue, the court shall make an order directing the parties to proceed to
 arbitration in accordance with the terms of the agreement.

6 9 U.S.C. § 4.

7 5.13 Section 3 of the FAA requires that suits brought in state or federal court must be
 8 stayed pending resolution of the arbitration process. It provides:

9 If any suit or proceeding be brought in any of the courts of the United States
 10 upon any issue referable to arbitration under an agreement in writing for such
 11 arbitration, the court in which such suit is pending, upon being satisfied that the
 12 issue involved in such suit or proceeding is referable to arbitration under such an
 13 agreement, *shall* on application of one of the parties stay the trial of the action
 until such arbitration has been had in accordance with the terms of the
 agreement, providing the applicant for the stay is not in default in proceeding
 with such arbitration.

14 9 U.S.C. § 3 (emphasis added).

15 5.14 Warren Weber properly executed the Arbitration Agreement on his mother's
 16 behalf, she is bound by the Arbitration Agreement, and Brookdale has the contractual right to
 17 the enforcement of the Arbitration Agreement under the FAA and Washington law.

18 5.15 Based on the foregoing, there is a real and present controversy existing between
 19 Plaintiff and Defendants regarding the proper venue for the claims asserted in the *Hardy*
 20 Lawsuit.

21 5.16 Plaintiff is entitled to declaratory relief establishing that the claims alleged in the
 22 *Hardy* Lawsuit are subject to arbitration pursuant to the parties' Arbitration Agreement and an
 23 order compelling arbitration.

24 V. PRAYER FOR RELIEF

25 WHEREFORE, Plaintiff prays for the following relief:

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1 1. A Declaratory Judgment in favor of Plaintiff and against Defendants Lorraine
2 Hardy and Ohana Fiduciary Corporation, establishing that the claims alleged in the *Hardy*
3 Lawsuit are subject to arbitration pursuant to the parties' Arbitration Agreement;

4 2. An Order compelling arbitration of the claims asserted in the *Hardy* Lawsuit and
5 compelling the parties to adhere to the terms of the Arbitration Agreement;

6 3. A stay of this proceeding pending arbitration;

7 4. An Order enjoining Defendants from pursuing their claims in the *Hardy*
8 Lawsuit, currently pending in the Superior Court of Washington for Snohomish County; and

9 5. Any other and further relief that the Court deems just and equitable.

10 DATED: January 22, 2015

11 LANE POWELL PC

12
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CERTIFICATE OF SERVICE

Pursuant to RCW 9.A.72.085, the undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the 22nd day of January, 2015, the document attached hereto was presented to the Clerk of the Court for filing and uploading to the CM/ECF system. In accordance with their ECF registration agreement and the Court's rules, the Clerk of the Court will send e-mail notification of such filing to the following persons:

Mr. Jeff B. Crollard
Crollard Law Office, PLLC
1904 Third Avenue, Suite 1030
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I also hereby certify that I have served by hand the document to the following non-CM/ECF participant:

OHANA FIDUCIARY CORPORATION
c/o Registered Agent Mark C. Vohr
9725 Third Avenue NE, Ste. 205
Seattle, WA 98115

Executed on the 22nd day of January, 2015, at Seattle, Washington.

s/Jennifer K. Sheffield

Signature of Attorney

WSBA No. 41929

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